NO 2374.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Coporation,
Plaintiff in Error,

vs.

SUSAN HARKINS,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

ROBT. H. ELDER,
ED. S. ELDER,
Attorneys for the Defendant in Error.

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POTLATCH LUMBER COMPANY, a Coporation,
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BRIEF OF DEFENDANT IN ERROR.

By this appeal the Potlatch Lumber Company is seeking to have reviewd a verdict and judgment, rendered and made in the above entitled cause in the District Court of the United States for the District of Idaho, Northern Division, at Coeur d'Alene, Kootenai County, State of Idaho, during the November term of said court in the year 1913.

Harry Harkins, the husband of the defendant, was employed by the Potlatch Lumber Company as top loader at or near Bovill, in Latah County, Idaho. While engaged at said work he was instructed by the foreman and superintendent of the company to leave his work as top loader and assist in skidding logs with a Marion Steam Loader, and was instruct-

ed and required to assist in pulling out the cable that was used for the purpose of hauling in and skidding the logs; and to station himself at a point visible to the engineer for the purpose of giving signals. While thus engaged under the direction of the foreman and superintendent of the company, Harry Harkins received injuries which resulted in his death.

The defendant in error, Susan Harkins, instituted this action, claiming damages for the death of her husband. The jury returned a verdict on the 22nd day of November, 1913, in favor of the plaintiff in the sum of five thousand dollars ($5,000.00), and judgment thereon was entered by the court on the 22nd day of November, 1913.

The evidence discloses the fact that the company was using a Marion Steam Loader for the purpose of skidding logs. The machine was not equipped with signal device or haul-back line, and is not customarily or generally used for the purpose of skidding logs, but is essentially a loading machine, and used for the purpose of loading logs that have been previously skidded along the track of a railroad.

The evidence further discloses the fact that if the machine had been equipped with a haul-back line and signal device, the engineer would have had abso-

lute control over the line, and the logs attached to it. That the machine which is usually and generally used for the purpose of skidding logs is equipped with haul-back line and signal device, and when so equipped there is no occasion for stationing men along the line for the purpose of giving signals.

ARGUMENT AND AUTHORITIES.

The first specification of error urged by the plaintiff in error is the refusal of the court to allow the witness, Harry Younkins, to answer the following question:

> "As a matter of fact, they were doing that work there that morning in the most proper and customary and usual manner under the circumstances, isn't that true?

Harry Younkins was the foreman and managing agent of the company in charge of the work, and was related by marriage to the defendant in error. The court, in his ruling, stated that owing to the peculiar relation that this witness bore to each of the parties, he would permit leading questions only to a limited extent.

The court was clearly justified in his ruling for the reason that the information sought is clearly a mixed question of fact and law, and was not proper inquiry to make of the witness.

The opinion of this witness could not be of assistance to the jury in arriving at the fact as to whether or not this company was negligent in operating the Marion Steam Loader as a skidding machine.

The plaintiff in error complains of the ruling of the court in sustaining the objection propounded to several of its witnesses as to whether or not the machine, known as the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet.

We submit that this was not a proper question--the witness should not be permitted to express his opinion upon the very question to be determined by the jury under the instructions of the court If the witness is allowed to testify that the Marion Steam Loader is a safe machine for the purpose for which it was being used, it will be seen that what he says is the full equivalent of the opinion that the defendant was not guilty of negligence. It is in substance the same as if he had testified that the plaintiff in error had used due care in selecting the appliance for doing this work. If this is not a substantial declaration by the witness that the defendant was not negligent, it is barely one degree removed from it.

Had the witness been allowed to answer these questions sought by the plaintiff in error, in our judgment, it would be permitting the witness to invade the province of the jury. A witness should state facts, the court should declare and explain the law, and the jury should find the facts. The functions of the three within their several spheres are clearly defined, and should always be kept separate and distinct.

Whether the Marion Steam Loader was so constructed that its operation was safe to the defendant's employees is the very question upon which the parties are at issue, and which the jury were empaneled to decide. The witness's opinion on that question is objectionable, and we submit the court's action in sustaining the objection was correct.

The admission or rejection of expert testimony in a given case must rest largely in the discretion of the trial judge.

17 Cyc. p. 57, state the rule:

> "The issue of negligence can in most cases well be determined by the judgment of the jury, and the inference, conclusion, or judgment of the witness is rejected. This rule has been applied for example to questions of whether a bridge, road, road-way, side-walk, track, or other place, machinery, mechanical appliances,

rate of speed, situation, or other things, or collection or combination of things, is safe or dangerous."

Thompson on the Law of Negligence in Vol. VI, p. 685, lays down the following rule:

"It may be stated as a general rule that if the facts of any particular inquiry can be so placed before the jury, that, as men of ordinary intelligence, they can fully understand the matter and draw the proper inference and conclusions therefrom, the opinions and conclusions of a witaess, whether an expert or non-expert, should not be received."

Richardson v. Eureka, 96 Cal. 443; 31 Pac. Rep. 458.

Kauffman v. Maier, 94 Cal. 269; 18 L. A. R. 124.

Shafter v. Evans, 53 Cal, 32.

Henion v. N. Y. etc. R. Co., 69 Fed. Rep. 903; 51 U. S. App. 157; 25 C. C. A. 223.

Pullman Palace Car Co. v. Harkins, 55 Fed. Rep. 932.

Munger v. Waterloo, 83 Iowa 559; 49 N. W. Rep. 1028.

Langhammer v. Manchester, 99 Iowa 36; 64 N. W. Rep. 682.

Atchison etc. R. Co. v. Lawler, 40 Neb. 356; 58 N. W. Rep. 986.

Bergquist v. Chandler Iron Co. 49 Minn. 511: 52 N. W. Rep. 136.

Labatt, on Master and Servant, Vol. 4, §1579, lays down the following rule on page 4842:

> "That the question whether a certain act or omission imported negligence under the given circumstances is not one which can be determined by expert testimony."

Justice Nelson, of the United Circuit Court for the District of Minnesota, in passing on this question in the case of Seese v. Northen Pac. Ry Co., 39 Fed. p. 488, says:

> "In such case expert testimony of a yardmaster that the method of coupling adopted by plaintiff was careless, dangerous, and not the usual or best way of coupling, was properly excluded.
>
> "The admission or rejection of expert testimony in a given case must rest largely in the discretion of the trial court, and where it is evidence that such testimony, if admitted, would tend to aid the jury in coming to a satisfactory conclusion upon the facts, such admission is not error."

State v. Hendel (35 Pac. 836)—4. Idaho Rep. 88.

Judge Wallace of the Circuit Court of Appeals, Second Circuit, in the case of Henion v. New York, N. H.& H. R. Co., 79 Fed., 903, in passing on this question, says:

"Some of the testimony which was excluded, offered for the purpose of showing how the platforms of other railroad companies were generally constructed, was subsequently introduced by the plaintiff, and she was permitted to prove what was the width of the platforms in use on other railroads of approved construction. In as much as the platform in question was a temporary affair, it is difficult to see in what view any of of this evidence was material. But we think it was all incompetent on another ground. If the defendant failed to provide the deceased with a reasonably safe place for the work which was expected of him, it was because the platform was to narrow, and located too near the tracks; and whether, because of these features, it was a dangerous or a reasonably safe place, was a matter which could be determined by a jury witnout the aid of any comparison with other platforms, or of any expert testimony. When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, there is no occasion to resort to opinion evidence."

Justice Temple, in the case of Giraudi v. Elec. Imp. Co., 107 Cal. 120; 48 Am. Rep. 115, in passing on this question, says:

"The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold the facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate: In Bemis v. Central

Vt. R. R. Co., 58 Vt. 636, an expert was held not allowed to testify 'that it was prudent to use a certain hoisting aparatus with less than three men, on a stone of two ton heft.' Yet the court said that there might have been shown 'the number of men required, danger in its use by a less number, its safety and adequacy when properly used,' and added that the jurors could as well decide for themselves. Of course the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question, and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do think it should be so held here. The answer of the witness gave the facts in full and explained what methods would have been safe. All this information might have been obtained by proper questions. And then it is not very material here. The negligence of the defendant was fully proven by other evidence."

Justice Earl of the Court of Appeals of New York, in the case of Harley vs. Buffalo Car Mfg. Co., 36 N. E. 814, in passing on this question, says:

"We think these questions were objectionable. A sample of this belt fastener was produced before the jury, also a piece of the belt, showing how the fastener was used. Its size and method of use were apparent to the jury. It was competent for the plaintiff to prove the strain to which it would be subjected, its liability to break, and all the experienced persons who had used it, and thus all the facts could be placed before the jury from which they could determine whether or not it was suitable and a

safe belt fastener. It cannot be proper to have the issue determined by experts, however skilful and experienced they may be. The facts should be placed before the jury, and they should be left to determine whether the belt fastener was safe or otherwise."

Van Wyckler v. City of Brookly, 118 N. W. 424; 24 N. E. 179.

Roberts v. R. R. Co., 128 N. Y. 455; 28 N. E. 486.

Schneider v. R. R. Co., 133 N. Y. 583; 30 N, E. 752.

"In an action against the owners of a saw-mill for personal injuries sustained by an employee in getting his hand caught in a lath-saw, the guage of which he was attempting to change while in motion, expert evidence that the guage used on that saw was as safe as other guages used on other saws is inadmissable, when the jury have a model of the saw before them, and can see for themselves just how dangerous it is to operate, and how the danger compares with that incurred in the use of other saws concerning which testimony had been given."

Sprague v. Atlee, et al, 46 N. W. 756.

Justice Angellotti of the Supreme Court of California, 74 Pac. 311, in passing on the following question:

"I will ask you now if the machine, you

have described and diagramed with connection with the brake then in use, would be or is or was on that day a safe machine and appliance to hoist the weight that you have described from a shaft over 200 feet deep?" says:

"The plaintiff was entitled to show and did show by this witness facts upon which the court could decide as to whether the machinery was safe or not. As it is shown in Giraudi information desired from which a conclusion of safety flows is admissable; and the answer to such a question is often such that its admission would not be held cause for reversal, but under the authorities there were no errors in sustaining the objection."

Sappenfield vs. Main St. R. R. Co., 91 Cal. 48, 27 Pac. 590.

17 Cyc. 45, lays down the following rule:

"Although an inference or conclusion be in the main a mere statement of a fact, and therefore under ordinary circumstances not amenable to the rule excluding 'opinion evidence,' the parties may, by involving the fact within the distinctive field of the jury's operation, place it within the mischief of intruding upon the jury's province, against which the opinion evidence rule was intended to provide. To protect this right the court will exclude so far as possible the inference, or judgment of witnesses where they cover the final inference as to the existence of a fact in issue."

In Shafter vs. Evans, 53 Cal. 32, it was said:

"The ultimate fact of negligence in such a case is not one to be established by mere opinion

of witnesses called to testify. The evidence of experts is not admissable."

Justice Marshall of the Supreme Court of Wisconsin, in the case of Hamann v. Milwaukee Bridge Co., 127 Wis. 550; 7 Am. & Eng. Ann., 458, in passing on this question, says:

> "It is not competent to introduce expert evidence as to whether a particular manner of moving a machine was proper, where the jury, when put in possession of all the facts, can form as reliable opinion on the question as an expert could, and where the jury can be put in possession of such facts."
>
> "The question as to the admissibility of opinion evidence lies in the field of competency, and the action of the trial court in admitting such evidence should not be disturbed on appeal except in case of a clear showing of error."

Hamann v. Mil. Bridge Co., 127 Wis. 550. 7 Am. & Eng. Ann. 459.

The court committed no error in refusing to allow the witnesses of the plaintiff in error to give their opinion as to whether or not the Marion Steam Loader was a safe machine and appliance for doing the work in which they were engaged at the time of the injury to the husband of the defendant in error. Clearly the weight or authority is that where the facts and circumstances under a given case can be

shown so that the jury may be in position to decide from those facts and circumstances, so produced, whether or not the machine so used was a safe one, expert evidence will not be permitted.

We further submit that the evidence in this cause shows that the facts and circumstances in this case were fully explained to the jury by competent witnesses, on behalf of both parties, that the various machines which are used for the purpose of skidding logs were explained and their operation, suitability and adaptability for the accomplishment of the work for which they were designed was discussed and placed before the jury; there were exhibited to the jury photographs of at least two of these machines; and that from the evidence introduced the jury was fully capable of arriving at the facts of whether or not the defendant exercised that degree of care which the law requires of it in selecting the appliances and machinery to perform the work in which it was engaged.

We submit that the action of the trial judge in refusing to allow the introduction of expert or opinion evidence will not be reviewed, unless the trial court abused his discretion.

The records in this cause clearly shows that

facts were submitted to the jurors, and that the jury was fully competent and capable of arriving at the fact as to whether or not the plaintiff in error was negligent in furnishing the Marion Steam Loader for the purpose for which it was being used at the time of the happening of the injury; and the record discloses the fact that the learned trial judge held this view when he refused the admission of this class of evidence. His ruling should not be reviewed on this appeal.

On the trial of this cause the plaintiff introduced evidence by a great number of witnesses, tending to show that the Marion Steam Loader was not commonly or generally used for the purpose of skidding logs in the manner in which the work was being done at the time of the injury to Harry Harkins.

Evidence on behalf of the plaintiff, now the defendant in error, tended to show that the Marion Steam Loader was a machine constructed, adopted and generally used for the purpose of loading logs, and that said machine was not constructed, or equipped, or a suitable appliance for the purpose of skidding logs as was being done in this case.

The defendant, now the plaintiff in error, produced several witnesses whose evidence tended to

show that the Marion Steam Loader was a machine commonly and generally used for the purpose of skidding logs.

The jury heard this evidence, and under the instructions of the court, must have found that the Marion Steam Loader was not in general use for the purpose of skidding logs. The trial court, in his refusal to grant plaintiff's in error motion for non-suit, and also for a directed verdict, stated at the conclusion of plaintiff's case that he was of the opinion that the plaintiff in error was negligent in furnishing this machine to its employees for doing the work which they were doing.

We submit that the evidence in this case clearly establishes a departure from custom; not only that, but that the departure was accompanied by greater hazard and peril to the employees in the use of the appliance or machinery.

The evidence clearly shows that the Marion Steam Loader, which was being used for the purpose of skidding logs by the plaintiff in error, at or near Bovill, Idaho, within a radius of five hundred feet, was not properly equipped, nor suitably or adapted for that purpose. That the use of said machine for skidding logs, as they were doing at this time and

place, increased the hazard and risk of the employees of said company. The evidence shows that had a proper appliance or machine been used that the logs being pulled down the hill-side could have, by the use of a haul-back line, been steadied in their course, and prevented from running without their course. The evidence further clearly shows that had a machine been used, which was properly equipped with a signal device, that it would not have been necessary to station parties along said line near the path in which the logs were traveling.

It was contended by the defendant in the lower court, and is contended by the plaintiff in error here that a departure from custom does not of itself establish negligence. Clearly the evidence in the case at bar establishes not only a departure from custom, but that said departure was accompanied by greater hazard and increased danger.

Labart on Master & Servant, Vol. 3, p. 2528, §939; lays down the rule as follows:

> "It may be laid down as an undisputed proposition that, where the injury complained of was caused by an instrumentality or method, which, at the time of the accident, was in its normal condition, evidence going to show that such an instrumentality was or was not commonly used under similar circumstances by persons in the

same line of business as the defendant is always competent for the purpose of proving that he was or was not in the exercise of due care in adopting or retaining that instrumentality as a part of his plant."

Baird v. Reilly, 92 Fed. 884.

"Nor is it disputed that if the evidence is conflicting as to whether such machinery is in common and ordinary use, the question of negligence in using the machinery is not one of law but of fact for the jury."

Labatt's Master & Servant, Vol. 3 §939.

In the case of the American Locomotive Works v. White 205 Red. Rep., 260, the Circuit Court of Appeals for the Third Circuit in passing on this question says:

"The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point now in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by the direct testimony of witnesses. The question in most issues of negligence is whether the defendant has used ordinary care under the particular cir-

cumstances. To establish his case, the plaintiff must prove the circumstances; and if negligence appears prima facie the defendant may then reply to the charge of evidence that his conduct has accorded with the common usage of the business. Undoubtedly the plaintiff may offer evidence in rebuttal to show that the defendant's conduct was not in accord with usage, and if he may do this in rebuttal we cannot say that the trial court does not have the discretion to permit him to offer the evidence in chief."

Judge Fawcett of the Supreme Court of Nebraska, in passing on this question in the case of Weed v. Chicago R. R. Co., 5 Feb., 623, 99 N. W. 827, says:

"Employers are not insurers. They are liable for the consequences, not of danger, but of negligence in methods, machinery and appliances in ordinary usage of the business "

26 Cyc., page 1108, also lays down the following rules:

"While not conclusive on the question of negligence, evidence is generally admissable in an action for personal injuries to show whether or not the master's machinery, appliances, ways and methods are such as are in ordinary and common use by others in the same business, but customary negligence, either on the part of himself or others is no defense to the master."

"The care which the law requires of a railroad company, respecting the safety of the place where work is to be performed by its employees

is ordinary care, such as prudent, intelligent, experienced men usually use under like circumstances to guard against dangers reasonably to be anticipated. It is not bound to use the best and safest appliances or guards, but, if it uses such as are customarily used under like circumstances, it discharges its duty."

Southern Pacific Co. v. Gloyd 138 Fed. 388, 70 C. C. A. 528.

"A master is bound to exercise only reasonable care with respect to machinery, appliances, or places to work; and the measure of such care is that ordinarily exercised by others in the same business."

Law v. Central District Printing & Tel. Co., 140 Fed. 559.

In the case of Kansas and Texas Coal Co., v. Brownlie, 60 Ark. 582, 31 S. W. 543, the court said:

"We know of no way of determining what ordinary care is except as ascertained of men of ordinary care and prudence engaged in the same business on their own account, and for their own profit and success are in the habit of doing."

"The rule that the master is not bound to supply the latest and best improvements for the use of his employees applies to electric appliances, it being sufficient for him to furnish such as are in general use, and generally regarded as reasonably safe."

Lancaster v. Central City Light & Power Co., 137 Ky. 355, 125 S. W. 739.

Thompson on Negligence, Supp. §3993, lays down the following rule:

> "The master is not a guarantor of the safety of an appliance furnished for the use of his servants but his duty is discharged if he exercised ordinary care and furnishes appliances which the experience of the particular trade or business has sanctioned as reasonably safe."

> "The master is not required to furnish the best, the safest or the newest appliances or methods of operation, nor to adopt extraordinary or unusual safeguards against risks and dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances and methods. The test of his discharge of this duty is the exercise of ordinary care to supply such places, appliances, and methods, of persons of ordinary intelligence and prudence commonly furnish in like circumstances."

Williams Cooperage Co. v. Headrick, 159 Fed. Rep. 682.

Wash. etc. R. R. Co. v. McDade; 135 U. S. 554, 570; 10 Supt. Ct., 2044; 34 L. Ed, 235.

Southern Pac. Co. v. Seley, 152 U. S. 145, 153 Sup. Ct. 530; 33 L. Ed. 391.

Mississippi R. Logging Co. v. Schneider, 20 C. C. A. 390, 391, 74 Fed 195, 196.

We submit from the evidence introduced in this

case, and under the law as laid down by the court, that this cause was properly submitted to the jury. The evidence clearly shows that the plaintiff in error failed to exercise ordinary and reasonable care in the selection and the furnishing of the Marion Steam Loader for the purpose of skidding under the circumstances as shown to have existed in this case,

The defendant in error introduced a great deal of testimony from men of long experience in the handling of these machines, who have had experience with said machines. not only in this section of the country, but in practically every state in the Union where extensive logging operttions are carried on. There evidence conclusively establishes the fact, and the jury so found, that the Marion Steam Loader was not a suitable machine or appliance for the purpose of skidding logs under the circumstances as shown in this case. Where evidence is conflicting the question is one for the jury, and we submit that this question was properly presented to the jury.

The plaintiff in error complains of part of the following instruction, found on page 178 of the Transcrip:

> "Nor does it necessarily follow that the method and device here used were improper because this particular accident might have been

avoided, if some other method or appliance or device had been used. 'To explain,, suppose the defendant had employed some other method by which certainly this accident could not have happened; still that method might have been attended with danger of other accidents, that is, accidents of a different kind; as an illustration, if horses had been employed for hauling in these logs this particular accident of course would not have occurred; it couldn't have occurred in just this way. But the question would still remain whether this method is more hazardous (and unreasonably hazardous) than the method of skidding logs by the use of horses."

" So, referring to the matter of using a signal device and haul-back line, possibly this particular accident might have been avoided, but you would not be justified in concluding that this is an improper methed or a negligent method simply or merely from the fact that you may conclude that this could have been avoided. The question stills remains for you to answer, namely: whether this method was more hazardous than the other referred to, namely: the haul-back." It seems that in using the haul-back line it is necessary, for instance, to draw logs by the use of temporary lines (I have forgotten just what the name was), to haul them in for some distance, to the main line. Is that process accompanied with danger? Are the dangers of that method greater or less than the dangers of this method? Now, I refer to these considerations in order to direct your attention to the rule which prevails in cases of this character, and in order also to impress you with its reasonableness. That rule is this, the duty of the employer. here the Potlatch Lumber Company, (and I state it to you in a general way, and then you will apply

it to the particular facts), the measure of the employer's duty is to exercise ordinary and reasonable care to supply the employee with appliances and places and methods of work which are reasonably safe, but not necessarily always the newest or safest appliances. Sometimes it is not definitely known whether a very new appliance is going to be safe or not. Not extraordinary safeguards, but such as men of reasonable intelligence and prudence, and possessed of due and ordinary regard for safety of life and limb, employ or would employ. Some men may employ one method and some another. Some men may think one method a little safer than another. It doesn't follow that either one is negligent because different methods are employed. The question is whether any of them are using a method or using a device which intelligent men, reasonably prudent men, who have ordinary and reasonable regard for the safety of others, are using. If they use such a method, that is, one that is reasonably adapted to protect from danger or against danger, then there is no negligence, even though some other man might employ another method, even though it is not entirely clear which is the better of the two. So your inquiry here should be, did the defendant, in employing the Marion loader, under the conditions under which it was employed, for the purpose for which it was used at that time, exercise such intellegence, prudence and regard for the safety of its employees as men of ordinary intelligence and prudence, and with regard for the safety of others, ordinarily employ and exercise? Now, if you should find the defendant was not negligent under those rules which I have laid down for you, your duty is at an end, and you shall return a verdict for the defendant. If, upon the other hand, you find it

was negligent, then you shall persue your inquiry further, and a necessary question is, whether or not Mr. Harkins assumed the risk of his employment at the time and under the circumstances under which the accident occured."

In our opinion the instruction does no injustice to the plaintiff in error; it clearly states the law.

We submit that the instructions of the court must be considered as a whole; and that no sentence or disjointed statement of the court should be construed except in the light of the whole instruction. From a careful reading of the instructions submitted by Judge Dietrich in this cause, the fact is disclosed that the statement to which the plaintiff in error objects was not made by the judge, and that the statement which was made, similar to the one which it complains of was an explanatory statement.

This case having been submitted to the jury under proper instructions, and the jury having found on the issue in favor of the plaintiff, we respectfully submit that the judgement should be affirmed

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Attorneys for Defendant in Error,
Res. and P. O. Add. Coeur d'Alene,
Idaho.

Service of the foregoing Brief of the Defendant in Error, by the receipt of a true copy thereof, admitted this ..... day of May, 1914.

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Attorney for Plaintiff in Error,
Res. and P. O. Add. Spokane, Wash.

No. 2374

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United States Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY
(a corporation),
Plaintiff in Error,

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Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Idaho—Northern Division.

ADDITIONAL AUTHORITIES ON BEHALF OF PLAINTIFF IN ERROR.

I.

THE COURT ERRED IN DENYING THE MOTION FOR A NONSUIT.

See specification XI of brief of plaintiff in error.

The evidence of the widow of the deceased showed that the deceased was an experienced backwoodsman and logging man, and that for about three months before he went to work for plaintiff in error, he worked as fireman on a Marion loader, a machine

of the same kind that is claimed to have caused his death (Trans. pp. 122, 123).

It was shown by witnesses of defendant in error that, at the time of the accident, the deceased had been engaged with the plaintiff in error in the same kind of work in which he was engaged in at the time he met his death, for three or four months (Trans. pp. 41, 68).

The deceased, therefore, at the time of the accident, was thoroughly acquainted with the characteristics and manner of operation of the machine in question, and was thoroughly aware of the fact that it had no haul-back, and that, therefore, if a log should jump or rush, the machine would be unable to control the log.

Under these circumstances, the deceased assumed the risk of injury from the very kind of accident which caused his death, and the motion for a nonsuit should have been granted.

Southern Pacific Co. v. Seley, 152 U. S. 145;
Bush v. Wood, 8 Cal. App. 647;
Limberg v. Glenwood Lumber Co., 127 Cal. 598;
Long v. Coronado R. R. Co., 96 Cal. 269;
Sweeney v. Central Pacific R. R. Co., 57 Cal. 15;
Malone v. Hawley, 46 Cal. 409;
McGlynn v. Brodie, 31 Cal. 376.

The complaint alleges that while the deceased was engaged in the work of assisting in the skidding of logs,

> "the said defendant, its employees, managers, and agents in charge of said work, carelessly, negligently, wrongfully and without regard to the safety of the employees and without regard to the safety of said Harry Harkins, pulled and hauled the said logs on to and against a tree, and negligently and carelessly and without regard to the safety of said Harry Harkins stopped said Marion loading machine and allowed the said log to run and be dragged on to and against a tree, knocking said tree over on to the said Harry Harkins, and the said Harry Harkins was thereby mortally wounded, of which injuries the said Harry Harkins died on the 9th day of November, A. D. 1911" (Trans. pp. 5-6).

It thus appears that the particular negligence which caused the death of the deceased, was the improper management of the log by the employees of the plaintiff in error.

The complaint, it is true, alleges that the machine with which the skidding was being done, was an unsuitable machine for such work.

But, to entitle an employee to recover for injuries suffered in the course of his employment by reason of a defective machine, the machine itself, and not the negligence of the fellow employees, must have been the proximate cause of the accident.

Vizelich v. Southern Pacific Co., 126 Cal. 587.

Even though the machine were defective, if the injuries of the deceased were caused proximately by the negligence of his fellow employees, the plaintiff in error is not liable.

Trewatha v. Buchannan Gold Mining & Milling Co., 96 Cal. 494.

II.

THE COURT ERRED IN REFUSING TO ALLOW PLAINTIFF IN ERROR TO ASK CERTAIN WITNESSES WHETHER THE MACHINE IN QUESTION WAS A REASONABLY SAFE MACHINE FOR THE PURPOSES FOR WHICH IT WAS BEING USED.

This point is involved in specifications of error numbered III, VII, VIII, IX and X.

In each instance the witness who was asked the question, was thoroughly familiar with the machine in question, and with the work of skidding logs, and was, beyond question, competent as an expert, to state whether or not the machine in question was a reasonably safe machine for the work in which it was being used.

The following authorities sustain the right of plaintiff in error to have that particular question answered by each of the witnesses.

Greenleaf v. H. & A. Works, 78 Cal. 610;
Bundy v. Sierra Lumber Co., 149 Cal. 772.

Respectfully submitted,
EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
WALTER H. LINFORTH,
Attorneys for Plaintiff in Error.

No. 2374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY
(a corporation),
Plaintiff in Error,

vs.

SUSAN HARKINS,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Plaintiff in error respectfully asks a rehearing of this cause and specifies the following as the grounds upon which the rehearing is asked, viz.:

That the trial court erred in refusing to permit various witnesses called by plaintiff in error to give the opinion evidence hereinafter referred to, *or* the trial court erred in refusing to grant the motion

made on behalf of the plaintiff in error for a directed verdict, on the ground the decedent assumed the risk, as hereinafter set forth, and that the judgment of affirmance of this court, upholding these rulings, is incorrect.

1. Upon the trial the plaintiff in error called five witnesses, viz.: E. M. Rogers, R. M. Hart, T. P. Jones, Norris B. Murphy and Michael J. Ward. It proposed to prove by each of them that, in their opinion, the Marion steam loader, by which the work was being done at the time of the happening of the accident to decedent, was a reasonably safe machine for the purpose for which it was then being used, viz.: skidding in logs within a radius of 500 feet, without a signal line or a haul-back line (see specifications of error 3, 5, 7, 8, 9 and 10, pages 5, 6, 7, 8 and 9 of opening brief).

The following question, propounded to the witness Rogers, will illustrate the rulings above referred to:

> "Q. Now, I will ask you to state whether or not the use of the machine, of the Marion steam loader, for hauling in these logs, under the circumstances that I have related, is or is not a reasonably safe machine for that purpose?" (Trans., page 128)

the circumstances under which the Marion steam loader was being used having, theretofore, been related.

2. After the introduction of all the evidence in the case, the plaintiff in error moved the court for a directed verdict in its favor on the ground, among

others, that the deceased, in entering upon and remaining in the employ of the plaintiff in error in the work in which he was engaged, assumed all risks and dangers incident to the operation of the steam loader, in the manner in which it was being operated, at the time of the happening of the accident. This motion was denied by the court, and this ruling is assigned as error (see specifications of error 11 and 12, pages 9 and 10, opening brief).

It is most respectfully submitted these rulings are contradictory and inconsistent. *Both* cannot be correct. If the steam loader was *obviously* unsafe for the doing of the particular work in which it was engaged when decedent met his death, then the trial court was correct in excluding the *opinion* evidence. On the other hand, if it was obviously unsafe, then it erred in denying the motion for a directed verdict, for in such event decedent assumed the risk, and the defendant in error cannot recover.

As said by Judge Wallace, of the Circuit Court of Appeals, in *Henion v. New York N. H. & H. R. Co.*, 79 Fed. Rep. 903:

> "When the facts can be placed before a jury and they are of such a nature that juries generally are just as competent to form opinions in reference to them, and draw inference from them, as witnesses, there is no occasion to resort to opinion evidence."

If this enunciation of the law is correct, and we do not think it can be successfully challanged, then the converse of the proposition must likewise be

correct, viz.: that if the facts are of such a nature that juries are *not* generally as competent to form opinions in reference thereto, and draw inferences therefrom as experts, then there *is* occasion to resort to opinion evidence.

What was the theory of the trial court in rejecting this opinion evidence? It must have been the facts and circumstances relating to the safeness or unsafeness of this machine, in the doing of the particular work in question, *were* of such a nature that the jury *was just as competent* to form an opinion on the subject as the experts. In other words, the trial court must have concluded the jurors, with the photograph of the machine before them, and a description of its operation, as detailed by the witnesses, were in a position to determine whether or not the machine in question was reasonably safe for the doing of this particular work. The moment it so concluded, we contend, *in effect,* it decided the decedent assumed the risk, and no recovery can be had because, of necessity, *the facts testified to by the witnesses relating to the safeness or unsafeness of the machine, were all known to the decedent at and prior to the time of the happening of the accident, which resulted in his death.* He surely was in as good, if not a better position, than the jury, to know whether the machine was safe or unsafe in the manner in which it was then being used.

It is not claimed by the defendant in error, there was any hidden defect in the steam loader—in fact, it was not even pretended there was *any* defect in

the machine itself, but the case is based upon the single proposition that the machine was unsuitable and unsafe for skidding in logs a distance of 500 feet, in that it was not provided with a signal line or a haul-back line. No one having eyes could help seeing the machine was not equipped with either. Decedent knew, prior to the happening of the accident in question, it was not equipped with either. Decedent knew, at the time of the happening of the accident in quetsion—in fact, for two weeks prior thereto—it was being used for the purpose of skidding in logs without either a signal line or haul-back line. If its use for the doing of this kind of work, without either a signal line or a haul-back line, or both, made the machine unsuitable and unsafe, no one engaged in this kind of work could have helped but know it. If the decedent knew it and continued at his work, he surely assumed the risk, and no recovery can be had in this action. If the jury, with just the photograph of the machine before it, and a description from the witnesses of the way it was operated, were, in the language of Judge Wallace, just as competent as experts to form opinions as to its safeness or unsafeness, then we ask was not the decedent in a *better* position than the jury to know this fact? Instead of the photograph of the machine which the jury had before it, he had the machine itself before him. Instead of the description of its operation, as outlined to the jury by the witnesses, decedent had before his own eyes the actual operations. Of course, he knew no haul-back line

or signal line was being used in connection with the machine in the doing of this work. He could see, and, of course, knew, the character and slope of the hill down which the logs were being skidded in, and if the jury could determine with reasonable certainty from being *told* how the machine was operated, and how the work was being done, that the machine was unsuitable and unsafe, why couldn't the decedent, who *witnessed* the entire operations? His opportunity for knowing and determining this fact was far better than that of the jury.

The decedent was a man forty years old, and from his different occupations, as shown by the record, must have been possessed of at least ordinary intelligence. Work of this character is attended with more or less danger. Any one possessed of ordinary intelligence would know this fact. The decedent had had experience in the woods and he was thoroughly acquainted with the Marion steam loader. He had been doing the work of scaling (Trans., page 56), and also had been fireman (Trans., page 123). He had been working there with this particular crew about two months or longer, and had been working, *skidding in logs with this machine* about two weeks (Trans., page 41).

If it was *obviously* dangerous to use this steam loader without a signal line or a haul-back line for skidding in logs a distance of 500 feet, down a hill with a ten per cent incline, surely the decedent, with his experience, knew, or should have known this fact. We assume the jurors were not skilled in the

doing of this particular work, and if sitting upon a trial lasting three days, and *listening* to the method of the doing of the work, they were competent to determine and decide that the machine in question was unsafe and unsuitable for the purpose of its then use, how can it be said the decedent, with his experience and opportunity of observation, was not *more* competent to determine this question than the jurors? It was his duty, under the law, to observe that which was going on about him, and the law will not permit one to close his eyes to danger which is open and obvious.

As said by Mr. Justice Shiras in *Southern Pacific Co. v. Seley,* 152 U. S., page 154:

> "It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, *were seen and known.* They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in a proper working condition. *Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed.*" (The italics are ours.)

As said by the court in *Glascock v. Central Pacific R. R. Co.,* 73 Cal. 141:

> "If he looked, he saw; and having age and faculties to understand the dangers, *is charged with a knowledge of them,* and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances."

As said by the Supreme Court in the case of *Hall v. Clark,* 163 Cal. at page 396, quoting from *Limberg v. Glenwood Lumber Company,* 127 Cal. 600:

> "He cannot be allowed to close his eyes to the danger and thereafter to say, 'I did not know it was dangerous'."

If the danger was open and obvious, it must be, the decedent assumed the risk. That the work was going on without the use of a signal line or haul-back line, was obvious. That the logs were being skidded in for a distance of 500 feet and less, was also obvious. That they were being skidded in down a hill with a ten per cent incline, was also an obvious fact. That there was danger of a log jumping out of its course, was also obvious to any person engaged in the work, possessed of ordinary intelligence and of mature years. It would seem that everything which tended to make the work dangerous, or the use of the steam loader in the manner in which it was being used, unsuitable or unsafe, was open and obvious. The decedent's knowledge and opportunities of knowledge as to the safeness or unsafeness of this particular machine, for the doing of the work in question, without the use of a signal line or haul-back line, was to say the least, *equal* to that of plaintiff in error, or any one else connected with the doing of this particular work.

As was said in the early case of *McGlynn v. Brodie,* 31 Cal. 379:

> "Where a party works with, or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed, or for any reason unsafe, with a knowledge *or* means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries arising out of accidents resulting from such defective condition of the machinery. This is the principle established by all of the cases."

In *Sanborn v. Madera Flume & Trading Co.,* 70 Cal. 266, it is said:

> "When a party works with, or in the vicinity of, a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained, arising out of accidents resulting from such defective condition of the machinery."

In *Fisk v. Central Pacific R. R. Co.,* 72 Cal. 43, it is said:

> "Where the servant has *equal* knowledge with the master of the danger incident to the work, he takes the risk upon himself if he goes on with it."

If on the other hand it was not *obviously* unsafe and dangerous to use the machine without a haul-back line or signal line, then the trial court erred

in excluding the opinion evidence. Where the facts are of such a nature that juries are *not* generally as competent to form opinions in reference thereto, and draw inferences therefrom, as experts, then opinion evidence is admissible. If here the facts *were* of such a nature that the jury was as competent to pass upon the question of the fitness or unfitness of this machine, as the experts, then the rulings of the trial court excluding the opinion evidence, was correct—not otherwise—but the moment this query is answered in the affirmative, then it must be, the ruling denying the motion for a directed verdict was erroneous, because the decedent, not only had the opportunity of knowing, but, of necessity must have known, *each fact* connected with the doing of the work in question that was submitted to and laid before the jury from which it concluded the machine in question was unsuitable and unsafe for the doing of this particular work.

In the briefs of the plaintiff in error, these two rulings were not contrasted in the manner set forth in this petition, but upon the oral argument counsel for plaintiff in error contended as now, these rulings are inconsistent and cannot be reconciled.

In the opinion, written by presiding Justice Gilbert, speaking of the contention of plaintiff in error that decedent assumed the risk, it is said:

> "As to assumption of risk, it does not appear from the evidence that the deceased so appreciated the risk of his employment that the case should have been taken from the jury. The

> deceased had been working as a carpenter about the logging camp, and about two weeks before the accident he had been assigned to work at skidding logs with the Marion steam loader. *Prior to that time, he had done no work with that kind of machine.* The court, under proper instructions submitted to the jury the question whether he assumed the risk." (The italics are ours.)

The record disclosed decedent had worked to some considerable extent upon and about Marion steam loaders. According to the uncontradicted testimony he had been working on a Marion steam loader as engineer about three months (Trans., page 123); he had worked as a scaler off and on for about two years (Trans., pages 56, 122); he had worked with the very crew that was operating this particular steam loader at the time of the happening of the accident, for a period of about two months immediately prior to the happening of the accident (Trans., page 41), and for about two weeks immediately prior thereto he had been engaged in the same kind of work he was doing at the time he met his death (Trans., page 41). Moreover, he had been following the logging business on his own account for quite a long time (Trans., page 122).

Aside from this, we respectfully submit the physical facts, each and every one of them, clearly demonstrate any man of mature years and possessed of ordinary intelligence, could not have failed to appreciate the risk of his employment. The fact that the jury were able to appreciate the risk, and place

the blame therefor, clearly demonstrates, as it seems to us, the decedent was in a *better* position to appreciate whatever risk there was than the jury. If there had been any *hidden* defect in the Marion steam loader, unknown to decedent, and which was brought to the attention of the jury upon the trial, as a result of which the accident happened, we could readily perceive how it might be claimed and said, in such a case it did not appear that the decedent had so appreciated the risk that the case should have been taken from the jury, but in a case like this, where the jury are not told, and do not know a single fact connected with the operation of the Marion steam loader that was not known to the decedent, we respectfully maintain it cannot be said the action of the trial court in denying the motion for a directed verdict, based on this ground, was correct. The moment it is conceded the jury was competent to pass upon this question from the testimony introduced describing the operation of skidding in the logs, that moment, it seems to us, it must be conceded the decedent assumed the risk, for he knew *at least* as much of the operation from actual observation, as the jury did from a description of it as told by the witnesses.

If we are correct in what we have stated, as to the physical facts surrounding the doing of the work at the time of the happening of the accident, and we respectfully submit we are, then we main-

tain the trial court should have determined, as a matter of law, the decedent assumed the risk, and the question should not have been left to the jury. There is no reason shown by the record *why* the decedent did not *appreciate* the risk. He was a man of mature years, possessed of more than ordinary intelligence, and whatever risk there was attached to the work in the way it was being done, was open and obvious to any one who cared to use his natural faculties. If, as declared in many well considered cases, where everything was open and visible "the decedent had only to use his senses and his faculties to avoid the dangers to which he was exposed", then we contend whether or not he appreciated the risk of his employment was one of law for the court, and not of fact for the jury.

We respectfully submit a rehearing should be granted plaintiff in error.

Dated, San Francisco,
October 26, 1914.

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
WALTER H. LINFORTH,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
WALTER H. LINFORTH,
Attorneys for Plaintiff in Error and Petitioner.

APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2374

Potlatch Lumber Company (a corporation),
Plaintiff in Error,

vs.

Susan Harkins,
Defendant in Error.

[OPINION, U. S. CIRCUIT COURT OF APPEALS.]

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge. GILBERT, Circuit Judge.

The defendant in error recovered a judgment against the plaintiff in error for damages on account of the death of her husband, who was killed while employed by the plaintiff in error in skidding logs. The crew of which the deceased was a member was engaged in skidding logs with a Marion steam loader. The deceased with two others had dragged

the cable with which the logs were skidded out about 400 feet to a point where they attached the cable to a log. The men, under the direction of the foreman, stationed themselves at intervals alongside and near the route the log was to travel. This was done for the purpose of signalling to the engineer. The timber was on a hillside with a grade of about ten per cent. As the log was being hauled in, it started to run, and in its course it struck and upset a tree which fell upon the deceased. Negligence is alleged in that the Marion steam loader was not suitable or adapted to be used as a skidding machine, and was not equipped with the proper appliances commonly used on skidding machines, and was a dangerous, unsafe machine for performing the work of skidding logs, in that it was not provided with a whistle cord or any device for the purpose of giving signals, and was not provided with a haul-back line.

Error is assigned to the denial of the motion of the plaintiff in error for an instructed verdict in its favor, on the ground that there was no proof that the death of the deceased was caused by the negligence of the plaintiff in error, that the Marion steam loader, was a reasonably safe machine, such as was in general use throughout the country and that the deceased assumed all risks and dangers incident to the operation thereof. It is now argued that the evidence shows conclusively that the machine so used, and the methods adopted at the

time of the accident were the same as those adopted and used under similar circumstances and conditions all over the country, and that common usage is the supreme test of due care in the selection of appliances and the adoption of methods for conducting one's business. But this argument ignores testimony which tended to prove that while the machine was in general use for loading logs on cars, it was not used for skidding purposes, and that increased hazard attended its use for that purpose. We are not convinced, therefore, that the court below erred in denying the motion, there being testimony to go to the jury tending to show the negligence of the plaintiff in error, testimony to the effect that the Marion steam loader was not commonly or generally used for skidding purposes, that it was a loading machine and intended to be used only in loading on a car, logs lying within a radius of 75 feet therefrom, and by means of a short cable. There was testimony of men of experience in logging that they had never seen the machine used for skidding purposes; that when so used, there was no way of giving signals except by shouting or waving the hand; that a machine used for skidding is equipped with a whistle cord for signalling purposes and a haul-back line; that such a machine has two drums, one for the cable which draws the log, the other for the haul-back line, and that the haul-back line is used for two purposes, one to carry the cable out into the timber, the other to hold the log in its course as it is being drawn by the cable.

There was evidence that if a haul-back line had been used in drawing the log which occasioned the death of the deceased, the log would have been held to its course and the accident would not have occurred.

It is true that employers are not insurers and that the party charging negligence does not prove it merely by showing that the machine is not in common use, for it may be that the machine used is safer than those which are in common use, but it is competent to show that the machine is unusual, and at the same time more dangerous than those in common use. Although there is conflict in the decisions, the better doctrine is well stated by the Circuit Court of Appeals for the Third Circuit in American Locomotive Co. v. White, 205 Fed. 260, as follows: "The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point now in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by the direct testimony of witnesses."

See also Chicago & Great Western Ry. Co. v. Egan, 159 Fed. 40; McGeehan v. Hughes, 217 Pa. 121; Giraudi v. Electric Imp. Co., 107 Cal. 120.

As to assumption of risk, it does not appear from the evidence that the deceased so appreciated the risk of his employment that the case should have been taken from the jury. The deceased had been working as a carpenter about the logging camp, and about two weeks before the accident he had been assigned to work at skidding logs with the Marion steam loader. Prior to that time, he had done no work with that kind of machine. The court, under proper instructions submitted to the jury the question whether he assumed the risk.

It is assigned as error that the court sustained the objection to the question asked the witness Younkin on cross-examination: "As a matter of fact, they were doing that work there that morning in the most practicable and customary and usual manner under the circumstances. Isn't that true?" The objection was sustained on the ground that the question was leading, and the court said that he would not permit either side to ask leading questions of the witness, inasmuch as he was then the foreman in the employment of the plaintiff in error, and was the son-in-law of the defendant in error. We need not discuss the ground on which the ruling was made. We think there was no error for the reason that the question called for the opinion of the witness as to whether or not the method of doing

the work was the most "practicable". In 17 Cyc 56, it is said: "The issue of negligence can in most cases well be determined by the judgment of a jury and the inference, conclusion, or judgment of witnesses is rejected. This rule has been applied, for example * * * as to conduct; as whether it was cautious, dangerous, in the line of duty, necessary, negligent, proper, prudent, reasonable, professionally skillful, safe, usual, or unusual, and whether such conduct constituted good management." Decisions in point are Atchison, T. & S. F. R. Co. v. Myers, 63 Fed. 793; Hunt v. Kile, 98 Fed. 49; Seese v. Northern Pacific R. Co., 39 Fed. 487; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551; Henion v. New York, N. H. & H. R. Co., 79 Fed. 903.

The foregoing considerations and authorities are applicable also to the contention that the court below erred in sustaining objections to questions propounded to witnesses as to whether or not the machine known as the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of 500 feet.

At the close of the instructions to the jury, counsel for plaintiff in error excepted to that portion thereof "which stated that the question for the jury to decide was whether the use of the Marion steam loader as it was being used at the time of this accident was more hazardous than if used with a haul-back." The court expressed his understand-

ing that the charge had not been so given, and in fact it had not. The court said: "To explain, suppose the defendant had employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents, that is, accidents of different kinds; as an illustration, if horses had been employed for hauling in these logs, this particular accident, of course, would not have occurred; it could not have occurred in just this way; but the question still remains whether this method is more hazardous, and unreasonably hazardous, more hazardous than the method of skidding the logs by the use of horses. So, referring to the matter of using a signal device and haul-back line, possibly this particular accident might have been avoided. But you would not be justified in concluding that this is an improper method or a negligent method, simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul-back." We find no error in the instructions so given, especially when it is considered in the light of the other instructions which covered all questions involved in the case. It was necessary for the court to submit to the jury the question whether the machine in use was unusual, and

whether it was more hazardous than the machine equipped with a haul-back line. We find no error.

The judgment is affirmed.

(Endorsed): Opinion filed October 5, 1914.
(Signed) FRANK D. MONCKTON, Clerk.